

IN THE SUPREME COURT FOR THE STATE OF MONTANA

Cause No. DA 09-0630

SHANE BUCHER,

Plaintiff and Appellant,

v.

PATRICK HAROLD HUGHES,

Defendant and Appellee.

BRIEF OF APPELLEE

On appeal from the Montana Ninth Judicial District Court, Toole County,
The Honorable Judge Laurie McKinnon, presiding

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STATEMENT OF THE CASE

The Appellant's Statement of the Case, while generally accurate, does not adequately set forth the historical context for the claim at issue here.

On June 23, 2001, Appellee Patrick Hughes (Hughes) struck Appellant Shane Bucher (Bucher) while Hughes was intoxicated and driving at a high rate of speed. (Appellant's Brief, pg. 1). The State of Montana charged Hughes with various misdemeanors and one felony count of negligent vehicular assault, a violation of Mont. Code Ann. § 45-5-205(3) (1999). Hughes pled guilty to the felony and, on June 19, 2003, the district court sentenced Hughes to a six-year suspended sentence with the standard conditions of probation plus the statutory condition that Hughes pay restitution to Bucher in the amount of \$37,133.70.

On May 7, 2009, the State of Montana moved to revoke Hughes's suspended sentence solely on the ground he had paid \$7,470.00 in restitution. After a hearing, the district court denied the State's petition to revoke Hughes's sentence and, alternatively, entered a civil judgment against Hughes pursuant to Mont. Code Ann. § 46-18-249.¹ At the revocation hearing, counsel for the State was present, counsel for Hughes was present, and civil counsel for Bucher was

¹Technically, the civil judgment portion of Mont. Code Ann. § 46-18-249 was not in effect at the time Hughes committed his crime, however the law, as enacted, provided that Mont. Code Ann. § 46-18-249 applies retroactively within the meaning of Mont. Code Ann. § 1-2-109. See Section 3, Ch. 284, L. 2001.

present; none of them objected to the district court's decision. See: (6/29/2009 Hrg. Trans., generally).

On July 16, 2009, a subsequent hearing was held to determine the precise amount of civil judgment to be imposed against Hughes. Both the State and Hughes's counsel agreed the amount was \$29,469.70, or the amount of the total restitution minus what Hughes had already paid. (7/16/09 Hrg. Trans. pgs. 4-5). Bucher's civil counsel indicated his calculations place the amount of the judgment to be \$34,415.70. (Id). At the conclusion of the hearing, the district court set the amount of the civil judgment against Hughes at \$29,469.70.

Bucher filed an appeal with this Court. The Appellate Defender Office of the State Office of Public Defender filed a limited appearance on behalf of Hughes to dismiss Bucher's appeal on the ground Bucher lacked standing to appeal. This Court determined Bucher had standing and allowed the appeal to proceed. (See "ORDER" in DA 09-0630, dated Feb. 3, 2010). The Appellate Defender Office withdrew but requested present counsel accept Hughes's case in a *pro bono* capacity.

Bucher's appeal is now before this Court on the issue of whether the district court erred when it denied Bucher interest on the amount of restitution at the time the the district court entered its civil judgment.

STATEMENT OF FACTS

The underlying facts regarding Hughes's criminal activity are uncontested for the purposes here. It is sufficient to state Hughes's criminal action resulted in a significant injury to Bucher. As a result of this injury Bucher incurred both physical and financial loss. For his criminal actions, the district court sentenced Hughes to a six-year suspended sentence and, pursuant to Montana law, properly required Hughes to pay restitution to Bucher as part of the criminal sentence imposed. (Dkt. No. 31)². The district court determined the amount of restitution owed as of the day of sentencing to be \$37,133.70. The district court's judgment was imposed June 19, 2003. (Dkt. No. 31). This is no indication in the record any of the parties (the State, Bucher, or Hughes) objected to the district court's calculation of restitution.

On May 7, 2009, the State moved to revoke Hughes's suspended sentence based solely on the ground that he had not paid the restitution amount in full. (Dkt. No. 45). At the time Hughes had paid \$7,470.00 toward restitution. (See Affidavit by Adult Probation Office attached to Dkt. No. 45). The recommendation made by the probation office was that the district court release

²All references to the docket in this Brief refer to *State v. Hughes*, Cause No. DC-01-28, Toole County District Court.

Hughes from formal probation but impose a civil judgment. (6/29/2009 Hrg. Trans., pg. 7).

A hearing was held on the State's Petition on June 29, 2009. Adult Probation and Parole Officer Jody Rismon – Hughes's probation officer – was called to testify for the State. (6/29/2009 Hrg. Trans., pg. 3). Officer Rismon testified that the only alleged violation of Hughes's sentence was that "there is still restitution owing [*sic*]." (6/29/2009 Hrg. Trans., pg. 5). Officer Rismon, under questioning by County Attorney Merle Raph, methodically detailed the ambiguity surrounding the total amount of restitution owed.

RAPH: How much restitution is currently owing [*sic*], at this time?

RISMON: Well that's still under debate, there's kind of a discrepancy with the State. Mr. Hughes was required in the beginning to pay just over \$37,000, and when the State took it over they added their 10%, taking that amount up over to \$40,000.00. However, Judge Buyske, at the time, had already set a specific amount for that, an [*sic*] our understanding is that the State's got to add their 10%, we have been kind of dealing with that, but the State's amount \$33,777.07

(6/29/2009 Hrg. Trans., pgs. 5-6).

Officer Rismon indicated her recommendation to the district court was that Hughes be released from formal probation but: "that does not release him from his obligation to pay the restitution amount." (6/29/2009 Hrg. Trans., pg. 7).

Officer Rismon went on to recount Hughes's history of payments toward the restitution amount.

RAPH: The amount of payments, the monthly payments, how much were they, generally?

RISMON: His most recent ones have been consistent at about \$100.00 a month.

RAPH: So, \$33,000.00, at \$100.00 a month, what are we looking at here, 20 more years of probation, 25?

RISMON: At least.

RAPH: Did you, during that time in making sure there were consistent monthly payments made, did you have any discussions or did you get any financial documents from Mr. Hughes to determine whether a hundred bucks a month was just walking around change, or was there a real hardship?

RISMON: Every month Mr. Hughes was required to turn in a monthly report to us, which is a breakdown of his income and expenses.

...

RAPH: Did you determine that \$100.00 a month was adequate?

RISMON: With the income that he had previously, and what he was paying out in child support, I think it was fairly lucky to get \$100.00, from what I could see with his other bills.

...

RAPH: Has there been any garnishment in this case?

RISMON: No, because he's been making payment.

RAPH: Have you had the opportunity to make any household visits?

RISMON: Yes, I have.

RAPH: Do you see anything you can latch on to in order for him to pay restitution?

RISMON: No, I don't think there is anything, at this time.

(6/29/2009 Hrg. Trans., pgs. 7-10).

Under cross-examination from Hughes's defense attorney, Officer Rismon further clarified that Hughes had never had any other violations during his six-year stint on probation. (6/29/2009 Hrg. Trans., pg. 10). Officer Rismon also testified that Hughes did not own a home, but had been living "in a yard of some friend in a camper trailer," for over a year. (6/29/2009 Hrg. Trans., pg. 11); he had "a couple of different jobs going at all times to make ends meet, (6/29/2009 Hrg. Trans., pg. 10); and had been regularly paying child support, (6/29/2009 Hrg. Trans., pg. 10).

At the conclusion of the hearing, the district court determined not to revoke Hughes's probation because he had made a good-faith effort to pay restitution.

The criminal court is not a good forum for collection of money damages on behalf of injured parties, an [*sic*] I believe that the garnishment statute, following a judgment, is probably the most equitable and fair way of handling it; that is, I can't punish Mr. Hughes for paying a hundred dollars, when that was all that was asked of Mr. Hughes, and I'm not sure how much more could be taken, given what I've heard about his situation today. Under the garnishment statute an execution on that judgment is the best way of

protecting [Bucher's] financial interests.

(6/29/2009 Hrg. Trans., pgs. 22-23).

At the conclusion of the hearing, the district court requested Bucher's civil counsel prepare a judgment for the parties to review and set the matter for a hearing on July 16, 2009. (6/29/2009 Hrg. Trans., pg. 23). While there was some ambiguity regarding the total amount of the civil judgment, the district court did make clear Hughes "has to receive credit for the amount he's already paid."

(6/29/2009 Hrg. Trans., pg. 25).

At the July 16, 2009, the district court was presented with two separate judgments due to a disagreement between Bucher and Hughes about the amount owed. The disagreement was between Bucher and Hughes. The State informed the court that it did not have "an iron in this fire." (7/16/2009 Hrg. Trans., pg. 4). The only concern voiced by the State was that "the victim receives the proper amount," and that the State would rely on the amount calculated by the Probation and Parole Officer. (7/16/2009 Hrg. Trans. pg. 5).

Bucher presented a proposed judgment which was identical to the restitution figure set forth in the original criminal judgment: \$37,133.70 – \$2,718.00 for medical expenses and \$34,415.70 in lost wages. The total amount came to \$37,133.70. Hughes's defense counsel disputed Bucher's amount because it

would not give him credit for the amount he had already paid toward restitution.

“If the Court adopts Mr. Anderson’s [Bucher’s civil counsel] approach, Mr.

Hughes will not get credit for the \$7,000.00, the \$7,170.00 he’s already paid in for restitution.” (7/16/2009 Hrg. Trans. pg. 7).

Bucher supported his figure by justifying the amount Hughes had already paid as interest payments on the original amount.

The defendant’s approach does not even take into consideration the judgment interest that is clearly prescribed by statute, and prescribed by law.

In Montana, under 27-1-211, ‘Every person who is entitled to recover damages certain or capable of being made by calculation and the right to recover that is vested in the person upon a particular day--’ and the particular day in this case is June 19, 2003, the date of the [criminal] judgment, ‘is entitled to recover interest on the damages from that day, except during the time the debtor is prevented by law or by the act of the creditor from paying the debt.’ There are no issues in regard to that, so the approach taken by defense counsel does not even account for the interest due in this case, and the interest due in this case is in excess of \$20,000.00. Rather than quibble over what’s been paid and what hasn’t been paid, and the amount of interest, etc., it seems to me the simple solution is the solution I propose which is simply to relate the amount that is described in the original judgment, is what I did, and thereby enter a judgment in the manner that is described by the statute.

(7/16/2009 Hrg. Trans., pg. 6-7).

Hughes responded that if Bucher wanted interest payments on the amount of the restitution, nothing prohibited him from seeking a civil judgment in 2003, when the criminal judgment was entered. (7/16/2009 Hrg. Trans., pg. 7). Hughes

had proffered a proposed civil judgment in the amount of \$29, 469.70. Counsel for Hughes represented the figure had been determined by calling Officer Rismon. (7/16/2009 Hrg. Trans., pg. 4).

The district court settled the issue by calling Officer Rismon to the stand to testify about the amount already paid by Hughes. Officer Rismon testified she “took the \$7,170.00 and took the original amount of restitution and subtracted what had been paid.” (7/16/2009 Hrg. Trans., pg. 9).

The hearing concluded with the district court informing the parties that it “would get an order out on the case as soon as [it] can.” (7/16/2009 Hrg. Trans., pg. 9). On August 11, 2009, the district court entered an “Order Denying Petition for Revocation of Suspended Sentence and Entry of Civil Judgment.” (Dkt. No. 59). In that Order, the district court denied the State’s petition to revoke and entered a civil judgment in favor of Bucher “in the amount of the unpaid restitution, which is \$29,463.70, pursuant to Mont. Code Ann. § 46-18-249.

Later, on November 13, 2009, the district court entered a judgment under the civil caption: *Bucher v. Hughes*. Again, the district court set the judgment in the amount of \$29,463.70. (Dkt. No. 60).

Bucher appealed the district court’s finding to this Court. Hughes’s challenged Bucher’s standing to appeal. This Court ruled Bucher had standing to

appeal the amount of the civil judgment, but lacked standing to appeal the district court's denial of the State's petition to revoke Hughes's suspended sentence. (See "ORDER" in DA 09-0630, dated Feb. 3, 2010).

STANDARD OF REVIEW

Hughes disagrees with Bucher's proposed standard of review. The appropriate standard of review for this Court is to determine whether the district court's findings of fact regarding the amount of restitution were clearly erroneous. "We review a district court's determination of the amount of restitution due as a finding of fact. Findings of fact regarding the amount of restitution ordered as part of a criminal sentence are reviewed to determine whether they are clearly erroneous." *State v. Essig*, 2009 MT 340, ¶ 12, 353 Mont. 99, 218 P.3d 838.

SUMMARY OF THE ARGUMENT

Bucher is not allowed interest because it was not imposed as a condition of his original criminal judgment. Sentencing courts have the authority to impose interest on restitution but it must be imposed at the time the amount of restitution is finalized. Bucher's opportunity for imposition of interest on the final restitution amount has long passed. To impose it now would amount to an impermissible and illegal modification of Hughes's original criminal sentence.

ARGUMENT

I.

The Court Should Decline Bucher's Appeal Because His Argument Regarding Judgment Interest is Brought for the First Time on Appeal.

Bucher argues he “should have been awarded interest on the full amount of restitution, from the date of the restitution order.” (Appellant's Br., pgs. 3-4). In fact, Bucher's sole argument is that “The District Court Erred in Refusing the Crime Victim Judgment Interest Accruing from the Date of the Restitution Order.” (Id.). It deserves attention Bucher did not specifically request interest on the total amount of restitution to the district court at the time of revocation hearing. Rather, Bucher indicated the interest “due in this case is in excess of \$20,000.00.” (7/16/09 Hrg. Trans., pg. 7). However, immediately after that statement, Bucher indicated that “[r]ather than quibble over what's been paid and what hasn't been paid, and the amount of interest, etc., it seems to me the simple solution to... the solution I propose which is simply to relate the amount as described by the original judgment.” (Id.).

In support of his argument, Bucher places specific emphasis on Mont. Code Ann. § 46-18-249 which reads in relevant part, “[t]he total amount that a court orders to be paid to a victim may be treated as a civil judgment....” Bucher seems

to argue the civil judgment should be for the total amount of the original restitution set forth in the criminal judgment, regardless of the amount Hughes has already paid. Bucher argues “[i]n the present case, the court entered judgment only for a part of that amount - - not for the total restitution ordered in 2003.” (Appellant’s Br., pg. 4). Bucher then argues the “[civil] judgment should have been in the full amount of the restitution order, accruing interest from the date when the order was made - - June 5, 2003.” (Id.).

First, Bucher’s argument that the district court’s civil judgment should have included interest accruing from the date when the criminal judgment was entered, is directly contrary to the argument he made during the July, 2009, hearing in which he indicated he did not want to “quibble over...the amount of interest.” (7/16/09 Hrg. Trans., pg. 7). Bucher’s claim that “[i]nterest should have been accruing on the full judgment prior to the date of Hughes’s partial payments,” is brought for the first time on appeal. “Parties may not raise claims for the first time or change legal theories on appeal.” *State v. Weatherell*, 2010 MT 37, ¶ 16, 355 Mont. 230, 225 P.3d 1256 (citing *State v. Weaselboy*, 1999 MT 274, ¶ 16, 296 Mont. 503, 989 P.2d 836).

Bucher argues for the first time, that the district court should have included judgment interest in the civil judgment. Bucher would have this Court, without

any facts or specific calculation of amount, impose judgment interest accruing from the day the criminal judgment was imposed against Hughes. This argument marks a remarkably drastic shift from the legal argument presented to the district court in which Bucher indicated his reluctance to “quibble” over interest payments.

For this reason, Bucher’s claim, brought here for the first time, should be dismissed.

II.

A Civil Judgment Imposed by a District Court Pursuant to Mont. Code Ann. § 46-18-249 Cannot Alter the Terms of the Original Criminal Judgment.

Bucher does not argue a specific amount of interest to be paid, or a specific rate at which interest is to be paid. Rather, assuming *arguendo* that Bucher’s appeal is properly before this Court, Bucher’s requested relief requires that this Court modify a criminal judgment beyond its original scope. “The [civil] judgment should have been in the full amount of the restitution order, accruing interest from the date when the order was made – June 5, 2003.” (Appellant’s Br., pg. 5). In essence, Bucher asks this Court to amend the terms of his original criminal judgment beyond that which was initially imposed. Such a modification is inconsistent with both statutory and common law.

That a district court has the ability to assign interest to restitution payments is undisputed. This was settled in 1999 by this Court's decision in *State v. Brewer*, 1999 MT 269, 296 Mont. 453, 989 P.2d 407. In *Brewer* the district court had ordered the defendant pay 10% interest on the restitution obligation. The defendant appealed claiming that such interest was an abuse of discretion because it exceeded the pecuniary loss of the victim. *Id.* at ¶ 25. This Court disagreed and affirmed the district court.

We note that the issue of whether interest may be properly applied to restitution under § 46-18-241, MCA, is one of first impression for this Court. Interest is not expressly provided for by the restitution statute. However, the statute provides for restitution to a victim who has sustained pecuniary loss, 'including economic loss as a result of the crime.' *Section 46-18-241, MCA (1997)*. *Section 46-18-243, MCA*, also includes in its definition of pecuniary loss, restitution for 'all special damages but not general damages, substantiated by evidence in the record, that a person could recover against the offender in a civil action arising out of the facts or events constituting the offender's criminal activities. *Section 46-18-243, MCA*.

Brewer, at ¶ 27.

The Court went on to clearly specify that *Brewer's* victim, her employer, could recover interest on *Brewer's* crimes through several ways.

[The] Employer could recover interest on Appellant's restitution in several ways. Because Employer lost the use of the \$ 96,403.46 stolen by the Appellant, as well as the more than \$ 15,000 he paid to try to repair damage done to his financial records, Employer could recover interest on any amount awarded him in a civil action against

Appellant arising out of Appellant's theft under § 27-1-210, MCA, which authorizes interest in torts. '(1) ... in an action for recovery on an injury as defined in 27-1-106, a prevailing claimant is entitled to interest at a rate of 10% on any claim for damages awarded that are capable of being made certain by calculation....' *Section 27-1-210(1), MCA*, (1997). Because interest is a special damage, available to Employer in a civil action against Appellant, interest is properly applied to Appellant's restitution under § 46-18-241, *MCA*.

Brewer, at ¶ 28 (emphasis in original).

This Court's ruling in *Brewer* remains valid and has been applied on several occasions. Because *Brewer* was decided almost four year prior to the imposition of Hughes's sentence, the district court here certainly had the authority to impose interest on the restitution amount *at the time Hughes was sentenced*. Thus, the proper time to request the district court impose interest on the restitution amount was at the time Hughes was sentenced. Bucher had the same civil counsel at the time Hughes was sentenced as he has now. (Appellant's Appendix "Affidavit of Lawrence A. Anderson, ¶ 2). It is unknown why Bucher did not request the district court impose restitution at that point.

The original judgment in this matter is attached as Appendix A. In two separate locations in that judgment, the district court set forth the amount of restitution to be \$2,718.00 for medical expenses, and \$34,415.70 for lost wages. (Appendix A, pgs. 4-5). There is no mention the district court intended Hughes to

pay interest, even though it had the discretion to do so.³ Nowhere in that judgment did the district court order Hughes to pay interest. The time for Bucher to request that interest apply to the restitution amount was at the sentencing hearing in June 2003, not six years later. The record shows no such attempt was ever made. If an attempt was made, the obligation to appeal denial of interest rested with the State; it did not do so.

This Court has ruled a criminal defendant may not, within the context of a revocation proceeding, challenge the legality of the conditions imposed on a prior sentence, as such a challenge is untimely. *State v. Muhammad*, 2002 MT 47, ¶ 22, 309 Mont. 1, 43 P.3d 318. Such a time-bar should also apply to Bucher in this case, especially since the district court denied the State's petition to revoke. In order to fully understand the limitations on a district court's ability to modify a restitution amount originally set, one must embark on a labyrinthian quest through the Montana Code.

The options for a district court faced with a petition to revoke a suspended sentence are set out in Mont. Code Ann. § 46-18-203. One of those options, at subsection (7)(c), provides, “[i]f a judge finds that an offender has not violated a

³ A transcript of Hughes's sentencing hearing has not been made available so it is unknown if the district court's oral pronouncement of judgment included interest. However, the statutory time limit to amend a judgment to conform with the oral pronouncement of sentence pursuant to Mont. Code Ann. § 46-18-116 has long passed. The written judgment stands.

term or condition of a suspended sentence or deferred sentence, that judge is not prevented from setting, modifying, or adding conditions of probation as provided in 46-23-1011.” That section allows court to add or alter the terms of a probationer’s conditions even if the court has not specifically revoked the suspended or deferred sentence. Mont. Code Ann. § 46-23-1011. However, subsection (4)(f) therein states “the court may waive or modify a condition of restitution **only** as provided in [Mont. Code Ann.] § 46-18-246.” Mont. Code Ann. § 46-23-1011(4)(f) (emphasis added). Section 46-18-246 reads:

On offender may at any time petition the sentencing court to adjust or otherwise waive payment of any part of any ordered restitution or amount to be paid pursuant to 46-18-241(2)(a)⁴. The court shall schedule a hearing and give a victim to whom restitution was ordered notice of the hearing date, place, and time and inform the victim that the victim will have the opportunity to be heard. If the court finds that the circumstances upon which it based the imposition of restitution, amount of the victim’s pecuniary loss, or method or time of payment no longer exist or that it otherwise would be unjust to require payment as imposed, the court may adjust or waive unpaid restitution or the amount to be paid pursuant to 46-18-241(2)(a) or modify the time or method of making restitution. The court may also extend the restitution schedule.

Mont. Code Ann. § 46-18-246.

At the end of the statutory labyrinth, it is clear that even if the court does not

⁴Requiring the defendant to pay the cost of supervision of the payment of restitution as provided in 46-18-245, by paying an amount equal to 10% of the amount of restitution ordered, but not less than \$5.

revoke a sentence, it may still alter the terms of a restitution payment. However, such power to alter the terms of the restitution payment is limited by Mont. Code Ann. § 46-18-246, which provides – at minimum – restitution may only be altered upon petition of the offender. The statute does not allow a victim to petition the court to alter the terms of the restitution order. The time for the victim’s input is either at a modification hearing initiated by a defendant, or at sentencing.

Finally, as was noted by Hughes’s counsel during the July hearing, Bucher’s proposed civil judgment did not give Hughes proper credit for the \$7,170.00 that he had already paid. (7/16/09 Hrg. Trans., pg. 7). The relevant statutory law makes clear that “[a]ny restitution paid by the offender to the victim under a restitution order contained in a criminal sentence, including an amount or amounts paid in a civil proceeding to enforce payment of a restitution order contained in a criminal sentence, must be set off against any pecuniary loss awarded to the victim in a separate criminal action arising out of the facts or events that were the basis for the restitution.” Mont. Code Ann. § 46-18-249(3)


In this case, the district court, pursuant to Mont. Code Ann. § 46-18-244, clearly specified the total amount of restitution in June, 2003. The district court did not impose interest although it had the discretion to do so. Nothing in the law allows Bucher to alter the terms of that judgment to add interest payments at this

late date. As was pointed out by Hughes's counsel, Bucher had the opportunity to file a civil suit to sue for judgment interest. Bucher also had the opportunity to request the sentencing court impose interest at the time of sentencing in 2003. He elected neither of those remedies. In this case, the district court properly exercised its authority in not revoking Hughes's sentence and electing instead to impose a lawful civil judgment. The district court did not err, and this Court should deny Bucher's appeal.

CONCLUSION

Based on the above, Hughes respectfully requests this Court deny Bucher's appeal and affirm the amount of the civil judgment ordered by the district court.

Respectfully submitted this 31 day of May, 2010.

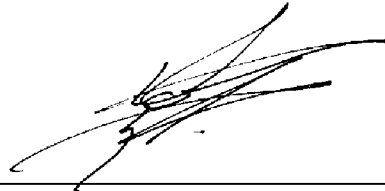


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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Mont. R. App. P., I hereby certify that this Appellee's Brief is printed in proportionally spaced Times New Roman text with a 14 point typeface; is double spaced except for footnotes and for quoted and indented material; and the word count, as calculated by my WordPerfect X3 software, is not more than 5000 words, not averaging 280 words per page.

Dated this 30th day of May, 2010.



Colin M. Stephens
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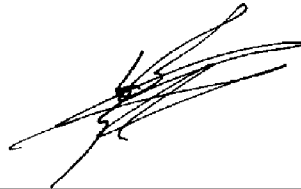
CERTIFICATE OF SERVICE

I, Colin M. Stephens, do hereby certify that I delivered a true and correct copy of this Brief of Appellee to the individuals named below via the means indicated:

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